

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of)

)
Amendment of the Commission's Rules to)
Permit Flexible Service Offerings in the)
Commercial Mobile Radio Services)

WT Docket No. 96-6

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**COMMENTS OF
AIRTOUCH COMMUNICATIONS, INC.**

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**COMMENTS OF
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AirTouch Communications, Inc. ("AirTouch") hereby submits its Comments in response to the *Report and Order and Further Notice of Proposed Rule Making* issued in the above-captioned proceeding.¹ As discussed below, AirTouch believes that the case-by-case regulatory scheme proposed for fixed services offered by Commercial Mobile Radio Service ("CMRS") licensees will undermine the very objectives sought to be achieved in this proceeding. A better approach, and one that is consistent with the intent of Congress, is to regulate all fixed wireless services as CMRS until such time as CMRS replaces land line service for a substantial portion of the public.

I. INTRODUCTION AND SUMMARY

The *Report and Order* amended the Commission's rules to allow providers of broadband and narrowband CMRS to offer fixed wireless services on their assigned

¹ *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, FCC 96-283, *First Report and Order and Further Notice of Proposed Rule Making*, 11 F.C.C.R. 8965 (rel. August 1, 1996). The Report and Order portion of this document will be referred to herein as the "*Report and Order*," and the Further Notice of Proposed Rulemaking shall be referred to as the "*Further Notice*."

spectrum on a co-primary basis with mobile services.² The amended rules allow CMRS providers greater flexibility to provide a wide range of service offerings including wireless local loop, telemetry, as well as fixed wireless architecture to link end users to cellular switches, and remote base stations. The rule changes were designed to “establish a framework that will stimulate wireless competition in the local exchange market, encourage innovation and experimentation in the development of wireless services, and lead to a greater variety of service offerings to consumers.”³

The Commission issued the *Further Notice* to address regulatory issues associated with the provision of fixed service by CMRS carriers. Although the Commission had originally proposed to treat all fixed wireless services as an integral part of CMRS services,⁴ the Commission abandoned this approach in the *Further Notice*, concluding instead that issues regarding the regulatory treatment of fixed wireless services require “more specific analysis related to the particular fixed service offerings that carriers develop.”⁵ To that end, the *Further Notice* proposes to address such issues on a case-by-case basis with a rebuttable presumption that licensees offering fixed

² See 11 F.C.C.R. at 8967.

³ *Id.*

⁴ *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Services*, WT Docket No. 96-6, FCC 96-17, *Notice of Proposed Rule Making*, 11 F.C.C.R. 2445, 2449 (rel. January 25, 1996) (“*Initial Notice*”).

⁵ *Further Notice*, 11 F.C.C.R. at 8985.

services over CMRS spectrum should be regulated as CMRS.⁶ Any interested party may challenge this presumption for any particular service offering.⁷

AirTouch submits that this proposed case-by-case approach is unduly cumbersome, and cannot be squared with the Commission's express desire to allow CMRS providers "maximum flexibility to provide fixed or mobile services or combinations of the two"⁸ in order to encourage the rapid development of new service offerings to meet dynamic and rapidly evolving market demands. As the Commission recognized, the record in this proceeding demonstrates that burdensome regulatory restrictions on the use of CMRS spectrum would be contrary to the public interest and will result in "inefficient spectrum use and reduced technological innovation."⁹ The Commission, in AirTouch's view, has not heeded its own findings. Under the *Further Notice* procedures, each new fixed service contemplated by CMRS licensees could well result in a detailed, expensive, and protracted review process which will inhibit rather than encourage the very competition, innovation, and experimentation which the Commission seeks to promote.

AirTouch urges the Commission to adopt, instead, a uniform approach to resolving questions regarding the appropriate regulatory treatment of fixed services offered on CMRS spectrum. Specifically, all fixed services provided over CMRS

⁶ *Id.* at 8987.

⁷ *Id.*

⁸ *Id.* at 8975-76.

⁹ *Id.* at 8976.

spectrum should be regulated as CMRS until CMRS replaces land line service for a substantial portion of the public.

As the Commission has recognized, treating fixed wireless services as CMRS avoids multiple layers of regulation, thereby encouraging competition and the rapid deployment of innovative technologies and services.¹⁰ Moreover, this approach is consistent with the fundamental Congressional policy of placing regulation of the CMRS industry in the hands of the FCC rather than the states in order to foster competition between the various providers of telecommunications services, including competition with traditional local exchange service. Indeed, as discussed in more detail below, in each instance in which Congress has considered matters touching upon competition between CMRS and local exchange service, Congress has elected to maintain the unique jurisdictional posture of CMRS, in effect, precluding state regulation of CMRS until future circumstances warrant state regulatory intervention.¹¹

II. THE COMMISSION'S REGULATORY PROPOSALS ARE UN-NECESSARILY INTRUSIVE AND WILL UNDERMINE THE GOALS SOUGHT TO BE ACHIEVED IN THIS PROCEEDING.

The Commission has found that providing licensees with "maximum flexibility to provide fixed or mobile services or combinations of the two over spectrum allocated for CMRS" will serve the public interest in facilitating competition and the

¹⁰ *Initial Notice*, 11 F.C.C.R. at 2449.

¹¹ This election has made the CMRS services highly competitive long before the Telecommunications Act of 1996.

deployment of innovative technologies and services.¹² AirTouch agrees with the Commission. Such services can include fixed local loop service, more diverse service and pricing options for data users and Internet service providers, point-of-purchase credit card verification, and electronic funds transfer.¹³ To promote the development of these types of offerings, the *Report and Order* frees CMRS providers from existing regulatory impediments on the use of CMRS spectrum by allowing them to offer fixed wireless service on a co-primary basis with mobile services.

In taking such action, the Commission decided to rely on market solutions, not regulatory intervention. The Commission has found that "limitations on fixed uses are unnecessary because the market is the best predictor of the most desirable division of this spectrum."¹⁴ Under the Commission's view:

Allowing service providers to offer all types of fixed, mobile, and hybrid services in response to market demand will allow for more flexible responses to consumer demand, a greater diversity of services and combinations of services and increased competition.¹⁵

The Commission's reliance on market forces is necessitated by the "dynamic, evolving nature of the wireless industry"¹⁶ and will enable carriers to "anticipat[e] what services

¹² *Further Notice*, 11 F.C.C.R. at 8975.

¹³ *Id.* at 8973-74.

¹⁴ *Id.* at 8976.

¹⁵ *Id.*

¹⁶ *Id.*

customers most need” and respond to the expected “rapid demand for fixed wireless service.”¹⁷

AirTouch submits that the burdensome regulatory scheme proposed for fixed wireless services will seriously inhibit achievement of these desirable goals. The Commission proposes a case-by-case procedure with a rebuttable presumption that any wireless service provided under a CMRS license should be regulated as CMRS.¹⁸ “[A]ny interested party” will be permitted to challenge the applicability of this presumption for any “particular service offered by a CMRS provider.”¹⁹ As envisioned by the Commission, a challenge to this presumption may well involve a detailed, fact-based analysis of the proposed service, the technology and system architecture involved, and the market to be served.²⁰ In short, for each new service offering or change to an existing service, a CMRS provider risks becoming entangled in a costly and time consuming “regulatory status” proceeding to determine the appropriate regulatory treatment for that service offering.²¹

It is easy to see how such proceedings can be used as a tool by carriers seeking to forestall or delay competition by dragging each and every new service offering from a competing CMRS provider before the Commission for a determination of the

¹⁷ *Id.* at 8974-76.

¹⁸ *Id.* at 8987.

¹⁹ *Id.* at 8988.

²⁰ *Id.*

²¹ As the Commission knows, this very approach can be used by incumbents to limit competition. The Commission should reject this opportunity.

appropriate regulatory treatment. CMRS carriers and the Commission alike will have to expend time and resources resolving these disputes. Thus, contrary to the fundamental purposes of CMRS flexibility as expressed in the *Report and Order* -- to stimulate competition, and encourage innovation and experimentation in the development of a greater variety of service offerings to consumers -- the *Further Notice* proposal will discourage the rapid development of new service offerings and hamper CMRS providers' abilities to alter their services to meet dynamic and rapidly evolving market demands.²²

Indeed, AirTouch believes the disincentive to competition, innovation, and experimentation that will result from the proposed case-by-case approach will exist even if the Commission simplifies the procedures under consideration in the *Further Notice*. The mere specter of a regulatory proceeding in connection with each new service or alteration to an existing service will inhibit to the rapid deployment of innovative technologies and services.

Consequently, AirTouch opposes the Commission's proposed case-by-case approach and urges the Commission to adopt a more uniform and certain solution to the appropriate regulatory treatment of fixed services offered on CMRS spectrum. As discussed below, all fixed services offered on CMRS spectrum should be regulated as CMRS until CMRS replaces land line service for a substantial portion of the public.

²² Many of these services may have multiple services included in one package, such as fixed service when at home, and mobile service when leaving the home.

III. FIXED SERVICES PROVIDED BY CMRS CARRIERS SHOULD BE REGULATED AS CMRS UNTIL CMRS REPLACES LAND LINE SERVICE FOR A SUBSTANTIAL PORTION OF THE PUBLIC.

Originally, the Commission proposed to treat fixed wireless services as an integral part of CMRS services offered by a CMRS provider.²³ A majority of the comments previously filed in this proceeding supported this simple, uniform approach.²⁴ Indeed, the *Further Notice* cites only a single commenter that advocates an opposing view.²⁵

AirTouch also believes that treating fixed wireless services as CMRS is a far preferable alternative than the approach under consideration in the *Further Notice*. This regulatory treatment will permit CMRS providers to launch new services and alter existing services rapidly to meet the dynamic and evolving demands of the market without the risk of having to obtain “regulatory status” approval for each and every new service offering, consistent with the goals of the *Report and Order*. AirTouch submits further that treating fixed wireless service as CMRS is consistent with the Congressional intent to place regulation of the CMRS industry in the hands of the FCC rather than the states in order to foster the development of CMRS as a viable competitor to land line local exchange services.²⁶

²³ *Initial Notice*, 11 F.C.C.R. at 2449.

²⁴ *See Further Notice*, 11 F.C.C.R. at 8983-84.

²⁵ *Id.* at 8984.

²⁶ This is especially true because many of the systems these services will be offered on are multistate in nature.

In each instance in which Congress has considered matters touching upon competition between CMRS and local exchange service, it has elected to maintain the unique jurisdictional posture of CMRS, consistently delaying state regulation of CMRS until some time in the future when CMRS represents a ubiquitous alternative to land line local exchange services. In 1993, Congress enacted the Budget Act which, *inter alia*, adopted a new Section 332(c) of the Act, establishing an exclusive federal regulatory scheme for CMRS.²⁷ Although Section 332(c) preempted state jurisdiction over CMRS rate and entry,²⁸ States are, nevertheless, permitted to petition the Commission for authority to regulate CMRS providers, but only when CMRS becomes a “substantial substitute” for land line service and other standards are met.²⁹ The States carry a high burden of proof to successfully prosecute these petitions.³⁰ Indeed, Congress advised the Commission that, in reviewing the petitions, it must “be mindful of the Committee’s desire to give the policies embodie[d] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice.”³¹

²⁷ Omnibus Budget and Reconciliation Act of 1993 (“Budget Act”), § 6002, 107 Stat. 312 (1993); 47 U.S.C. § 332(c).

²⁸ See 47 U.S.C. § 332(c).

²⁹ 47 U.S.C. § 332(c)(3).

³⁰ See *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7493 (1995).

³¹ H.R. Rep. No. 111, 103d Cong., 1st Sess., at 262 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588-589.

The Budget Act also amended the definition of the term “mobile services” in a manner that recognizes, and incorporates, the use of wireless technology to provide fixed services in competition with local exchange service. A review of the relevant legislative history indicates that Congress considered the possibility of using wireless technology to provide fixed services and elected to permit such services to be included within the definition of mobile services.³² The Conference Committee considered, and rejected, a proposal by the Senate to exclude certain fixed services from the definition of mobile service.³³

Further, the definition of “mobile services” was amended to include a reference to “any services for which a license is required in a personal communications service established pursuant to the proceeding entitled ‘Amendment to the Commission’s Rules to Establish New Personal Communications Services’ (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.”³⁴ Broadband PCS was intended to include a variety of fixed and mobile services, including “advanced digital cordless telephone service, portable facsimile services, wireless PBX services, and wireless local area network services, among others.”³⁵

³² See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess., at 496, *reprinted in* 1993 U.S.C.C.A.N. 378, 1185.

³³ Specifically, the Conference Committed rejected the Senate’s proposal to exclude from the definition of mobile service “rural radio service or the provision by a local exchange carrier of telephone exchange service by radio instead of by wire.” *Id.*

³⁴ 47 U.S.C. § 153(27).

³⁵ See *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 8 F.C.C.R. 7700, 7712 (1993). Having defined PCS, and by

The unique jurisdictional posture of CMRS established by the Budget Act was reconfirmed in the 1996 Act. The relevant portions of Section 332 of the Act were unchanged by the 1996 Act.³⁶ In addition, the 1996 Act added Section 253(e) to the Act which expressly reconfirms the Section 332(c)(3) preemption of state regulatory authority over CMRS rate and entry regulation.³⁷

Further, Congress was aware that CMRS providers offer telephone exchange and exchange access services when it enacted the 1996 Act, but declined to define CMRS providers as local exchange carriers.³⁸ The 1996 Act defined "local exchange carrier" to mean "any person that is engaged in the provision of telephone exchange service or exchange access," but "does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c),

extension the term "mobile services," to include a variety of fixed and mobile services, the Commission concluded in a different proceeding that all auxiliary services, including fixed services, provided by CMRS licensees should be included within the definition of mobile services. This decision was based in part upon the Budget Act which reflects Congress' intent to establish regulatory symmetry among mobile services. *See Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1424 (1994).

³⁶ Had Congress intended to revise the jurisdictional posture of CMRS under Section 332(c)(3) when it adopted the 1996 Act, it would have done so explicitly. Under standard principles of statutory interpretation, rules are not repealed by implication. *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

³⁷ 47 U.S.C. § 253(e) (as added by the 1996 Act).

³⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, FCC 96-325, *First Report and Order* ¶ 1004 (Aug. 8, 1996) ("Interconnection Order").

except to the extent that the Commission finds that such service should be included in the definition of such term."³⁹ The legislative history confirms that this provision was intended to allow the Commission to reconsider whether CMRS providers should be classified as local exchange carriers only if future circumstances warrant.⁴⁰ The Commission, in turn, has properly declined to regulate CMRS providers as local exchange carriers at this time.⁴¹

In sum, AirTouch submits that the Budget Act and the 1996 Act articulate a legislative intent to place regulation of the CMRS industry in the hands of the FCC rather than the states until future circumstances warrant a change in the regulatory structure. Regulating all fixed service offerings on CMRS spectrum under Section 332 of the Act will assure that CMRS rate and entry regulation remains within the exclusive jurisdiction of the Commission. By contrast, treating fixed services offered on CMRS spectrum differently than CMRS opens the door for states to impose unnecessary and anticompetitive requirements upon those services. Moreover, regulating fixed wireless services as CMRS will enable the Commission to revisit the regulatory status of fixed service offerings on CMRS spectrum should such services proliferate substantially in the future. Consequently, this regulatory treatment is consistent with the important

³⁹ 47 U.S.C. § 153(26).

⁴⁰ See H.R. Rep. No. 458, 104th Cong., 2d Sess. at 115 (1996).

⁴¹ *Interconnection Order* at ¶ 1005. As the Commission concluded in its Annual Report to Congress, CMRS is not yet competitive with wireline telephone service. *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, 8869 (1995).

Congressional policies set forth in the Budget Act and the 1996 Act and should be adopted by the Commission.

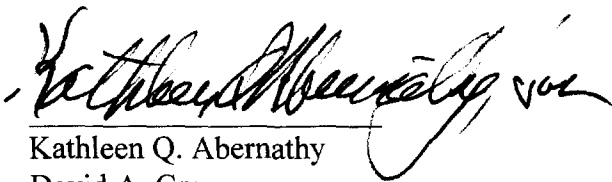
IV. CONCLUSION

For the foregoing reasons, AirTouch Communications, Inc. urges the Commission to regulate any fixed wireless service provided by a CMRS provider until that service constitutes a substitute for land line telephone exchange service on a widespread basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE


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